No. 3798

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Petition of the PACIFIC TOW BOAT COMPANY, a corporation, owner of the American Tug DEFENDER, for a limitation of Liability.

PACIFIC TOW BOAT COMPANY,
a corporation,

Petitioner-Appellant,

vs.

DOMINION MILL COMPANY,
a corporation,

Claimant-Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

Brief of Claimant-Appellee

JOHN E. RYAN,
GROVER E. DESMOND,
Proctors for Claimant-Appellee.

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STATEMENT OF THE CASE

The summary of the pleadings as set forth in the Appellant's Brief presents the issues for determination on this appeal. The Appellee, however, believes it desirable and material that the Lower

Court's decision on the merits be set forth, which is as follows:

"*Neterer*, District Judge:

The issue here is a question of fact. It is conceded that liability may be limited if negligence is shown, and in that event the decree shall not exceed the sum of $2,700.00, the appraised value of the tug. The facts to be found are the seaworthy condition of the scow, the negligence of the claimant, if any, and the amount of damage, if any, to be decreed. From the testimony it must be concluded that the scow at the time it was taken by the petitioner was seaworthy. It was very recently placed in 'good condition.' It was inspected by Wilson, the repairman for claimant. A few days before the casualty it was towed from Everett to Anacortes, and found in good condition. It was examined by the master of petitioner at the time it was taken and found that it had not water enough to siphon. It also appears that it was properly loaded. This was the status when the petitioner took the scow. It was taken into the open waters of the Sound and approximately 250,000 feet of lumber was lost. Something less than 50,000 feet was delivered. The petitioner asserts that it was free from negligence and that the fault was with the scow, because of age, decay, etc., she was unseaworthy. The only testimony of negligence is that the scow went onto the bank in the river, and also some testimony that the condition of the weather was such by reason of strong wind that a careful master would not venture out. There is also testimony as to the condition of the scow after she reached the mill. A long crack near her top seam in one corner; and one of the timbers in the gunnel was split. There is no continuity of evidence

as to the scow from the time of delivery until the survey about ten days later, during which time she was on the beach. It is impossible to harmonize all the evidence. The court from the evidence must find that the scow collided with the bank of the river. Two disinterested witnesses so swear. The extent of the damage, if any, no one who testified saw. The master swears he examined the scow at Priest Point after the time of collision charged before entering the open waters of the Sound, and found her to be all right. Entering the open waters of the Sound the lumber was lost. It must be concluded in view of the testimony that either the running onto the bank or the turbulent condition of the water occasioned the loss, and in either event the petitioner was at fault and should respond, and under Sections 4283 and 4284, Rev. Stat., the liability may be limited to the value of the tug. It is earnestly contended by the petitioner that even though the tug was negligent, that practically all of the lumber was salved and placed in a boom at Everett and testimony is produced that one man with a crosscut saw could in one day trim all of the damaged timber, so there would be no loss. The testimony, I think, shows that the damage by reason of the rounding of the edges of the square timber could not be compensated in the manner indicated. Again it was the duty of the petitioner to deliver the cargo at Blakely Island, and it could not relieve itself from liability by placing the timbers in a boom at Everett and notifying the claimant of such fact. The damage to the claimant is more than twice as much as the appraised value of the tug, and it appears from the testimony that the cost to recondition the lumber, and difference in value, it being a special order, and place it either at the point of shipment or destination would be as much at least as the

value of the tug, and for this expense the claimant could recover in any event.

A decree may accordingly be presented.

JEREMIAH NETERER,
District Judge."

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POINTS OF LAW AND FACT

I AND II.

Did the Scow Strike the Bank of the River and, if so, Did Such Impact Cause it to Leak? (First, Second and Third Assignments of Error.)

In cases of towage service of this character, where no representative of the claimant accompanies the tow, it is of necessity difficult to produce direct and chronological testimony of the mode and method of handling the scow by the Appellant. However, we confidently believe that the direct testimony, with the attendant circumstances and physical facts, establish such negligence. It becomes material to inquire and observe the physical condition of the scow CLAIRE prior to, at the conclusion and subsequent to the completion of the towage service.

The Lower Court found that the scow, at the time it was taken by the Appellant was seaworthy. The evidence abundantly supports such conclusion. *Stafford Wilson*, a witness on behalf of the Appellee, who did the construction and repair work at the plant of the Canyon Lumber Company, the consignor of the timber, testified that in June or

July preceding December, 1918, the scow was completely overhauled, at which time all the guard rails were taken off, she was re-caulked, the caulks cemented, painted and placed a new deck on top of the old deck; and from the time of such repairs she was kept in practically continuous service, and it was his duty to inspect and examine her (Rec. p. 28). That on the morning of the 11th of December, after she was loaded with her cargo of lumber, he again examined her. At that time he put on a new hatch and there was nothing wrong with the scow that he could see. He looked in the gunnels and she had no water. At that time he gave the scow a general examination, examined all the hatches and she was all right (Rec. pp. 29-30). All the hatches were properly caulked (Rec. p. 37), and he then fastened them down with four twenty-penny spikes and bent them over (Rec. p. 78).

W. C. Niemeyer, one of the claimant's witnesses, testified that he was Lumber Inspector and loaded the scow in question. That, before loading, he examined her and saw that she was seaworthy. The hatches were all on and caulked (Rec. pp. 49-50). In June or July she was overhauled and the deck re-caulked and a false deck put on top to protect the other deck and, after such overhauling, she was absolutely seaworthy. She did not leak and thereafter was continually used for towing lumber (Rec. p. 51).

Oliver D. Hancher, a tow boat captain, testified that he had towed the scow some three or four

weeks previous to the accident in question and had towed her many times to Blakely (Rec. p. 60). That, as far as being seaworthy, the scow was in good condition to take a load at any time and he had never had any trouble with her (Rec. p. 63).

Captain W. F. Oldenburg testified that he towed her from Everett to Anacortes approximately ten days prior to the date in question and found her in good condition (Rec. p. 80).

Captain Jeffries, the Master of the petitioner's tug DEFENDER, admitted that, when he tied on to her, she looked in good condition all around, and that there was not enough water in her to siphon (Rec. p. 90). And she appeared to be well loaded and stowed (Rec. p. 91).

Likewise, witnesses *Wilson* (Rec. p. 33) and *Niemeyer* (Rec. p. 37) testified as to the manner of loading and that the cargo was well loaded.

There is no testimony to the contrary, and it is, therefore, conclusively apparent, that the scow was seaworthy and properly loaded immediately prior to the appellant assuming her custody and control.

It is likewise material to determine her condition at Port Blakely after she had sprung the leak and had dumped the greater portion of her load.

John S. Clark, a lumber inspector, for the Appellee, at its mill in Port Blakely, testified that he examined the scow when they were drawing the

water out of her on the beach at Port Blakely. That a light was put down through the hatch and you could see the light through the crack; that it was several feet long; that, while he did not measure it, he pushed his ruler through it (Rec. p. 25), and that this crack ran lengthwise of the scow (Rec. p. 27).

Captain J. C. Johnson examined the scow at Port Blakely and found that some of the seams were opened at least three-quarters of an inch, a guard was torn off from the end and the oakum was out three feet long on the side of the scow. He did not examine the interior of the scow (Rec. pp. 81-82).

It is also material to consider her condition upon her return to the Canyon Mill. *Mr. Wilson* testified that, upon her return, one end of her was cracked in, that the crack extended back about ten feet from the corner and about fifteen or eighteen inches below the deck; that one of the gunnel timbers had a new split thirty or forty feet long (Rec. p. 38). In his opinion, such damage was caused by her being heavily jammed into something and he did not believe that such would be caused by the wash of the sea (Rec. p. 41).

Mr. Niemeyer testified that he examined the scow upon her return and he found that the header on the end side was lifted up for a distance of ten or twelve feet. He also observed that one of the bulkheads was lifted up and that one of the gunnels running through the inside of the scow was split or

lifted up for twenty or thirty feet (Rec. p. 52). That he believed the header was not raised and split by the wash of the sea, but that she had come in contact with some solid substance (Rec. p. 52).

It, therefore, conclusively appears that, at the time the DEFENDER took the Claire in tow, she was in a seaworthy condition. It is admitted that, after the tow entered the waters of Puget Sound, she shipped water, became partly submerged and dumped the greater portion of her load. The testimony of the Appellee as to the scow's damaged condition at the conclusion of her voyage and upon her return to the Canyon Mill is undisputed. The conclusion is, therefore, irresistible that some untoward event must of necessity have occurred to cause the resultant damage and loss. Such events are not of common occurrence. They are not the general rule, but an aggravated exception. The distance from Priest Point to Port Blakely, the towing distance, was approximately twenty-eight miles—ordinarily an uneventful and short tow. Therefore, some intervening circumstance of necessity changed the voyage from its ordinary status to disaster. The conclusion must be that either the scow was unseaworthy and the resultant loss was due to her defective condition, or she was so negligently handled by the appellant as to cause such damage. The former contention is untenable in view of the positive testimony of her seaworthiness and Captain Jeffries' admission that she so appeared to him before he took her in tow. In fact, such complaint is

now offered for the first time and then only as an argumentative and speculative theory, the appellant's contention being that the master of the tug was not negligent and the deduction is that the scow was unseaworthy. Admittedly something occurred to alter the physical condition of the scow on this voyage. What such occurrence was is not left to speculation or vague wonder, as urged by the appellant, for there is positive and credible testimony that the scow ran against the bank of the river shortly after she left the mill and about one quarter of a mile therefrom. The Court, in its opinion, stated:

> "The court from the evidence must find that the scow collided with the bank of the river. Two disinterested witnesses so swear."

This conclusion of the Court is abundantly supported by the evidence. *Mr. Wilson* testified that, after he had made the repairs on the scow and started toward the mill, his attention was directed to the fact that the scow was on the bank. He stopped and looked and saw the scow against the bank. At that time she was moving, but he did not know whether she was moving with the current or the tug, as it seemed to be mixed up in some way. That he looked at it for a few minutes and then went about his work (Rec. pp. 30-31). That she struck the right-hand bank of the river as she was going downstream; that he only watched it three or four minutes and they were maneuvering about at the time. She was against the bank and not

approaching it when he saw her (Rec. p. 37). The place where she went against the bank was about a quarter of a mile from the mill (Rec. p. 36).

Percy Ames, a witness on behalf of the claimant, testified that he saw the scow against the bank about a quarter of a mile from the mill. That he saw her go against the bank and the tug stopped and swung with the current when she hit. It was practically broadside to the river when she touched the bank. He then got around and did not stop any more than to square himself in the river and go again (Rec. p. 43).

Captain Jeffries testified that he was maneuvering about in the river and that, when you are alongside of the scow and shove ahead there is a tendency to shove sideways to a certain extent and that the load on the tail end of the scow rubbed the trees that overhung the bank of the river (Rec. p. 89). He likewise stated that, as he started down the river, the lines from the scow to the tug got slack and, while he was maneuvering to tighten the same, that the scow made an angle of about forty-five degrees across the river (Rec. p. 88). The natural inference is that it was these maneuvers that witnesses *Wilson* and *Ames* testified about, and that the tow was, though even for an instant, out of the control of the tug.

Garner, the deckhand on the tug, and the only other witness testifying for the appellant on this point, admitted the same facts (Rec. p. 131).

Captain Hancher, an experienced tow boat man, who is familiar with the river at this location, stated that the resultant damage to a scow running into the bank of a river in this location would depend upon how it struck. On one occasion it might strike the mud with no damage but that, if it struck a root or stump, slight contact would be all that would be necessary to put a hole in it, and in this particular location the bank was full of stumps, roots and things (Rec. p. 65). That whether or not such a contact against a stump would break the plank or open a seam depended upon the manner in which the scow came into contact. Such contact against a stump would have a tendency to open the seams. That you might run into a bank a dozen different times and at each time have a different effect upon your scow; that it all depended upon what the scow would go up against (Rec. pp. 68-69).

The Court was justified in holding that the witnesses for the claimant on these facts were disinterested for they were in no wise connected with the claimant, owed claimant no responsibility or duty and were absolutely disinterested, while the witnesses to the contrary, the master and deckhand of the tug, were no doubt prompted in their testimony by their fidelity to their employer, coupled with a natural desire to free themselves from blame and negligence. And in its final analysis, the issue presented is one of fact dependent entirely upon the credibility of the witnesses.

We respectfully submit that the testimony of the disinterested witnesses that she went against the bank is the true version of the event and that the contention of the tug's crew that it was only her load that brushed the overhanging trees is but a futile effort to obscure the real facts explanatory of its close proximity to the bank. The petitioner, however, offers no excuse whatsoever for the tow being in close proximity to the bank. The river at the point in question was abundantly wide for the tow in question. The witness *Garner* testified that, when they finished tightening their lines, they were approximately in mid-channel (Rec. p. 131). No satisfactory explanation is offered for immediately thereafter crowding the bank of the river. Surely careful navigation would not permit such a hazard and leave no room for difference of opinion as to whether the scow was against the bank or merely her load touching the trees.

Since the evidence is that the scow struck the bank, the conclusion is irresistible that such impact so loosened her seams and damaged her that, when she went out into the open waters of Puget Sound, the choppy seas completed the damage initiated by such contact. No other conclusion can be logically followed, for, according to the contention of the appellant, the maximum wind was but eighteen miles per hour. Captain Jeffries insisted that it was not an unusual or dangerous sea. The positive testimony is that such a sea would not have caused the result and damage if she was seaworthy. The

undisputed evidence is that she was seaworthy. If it were not the collision, what caused the injury to her? Appellant speculates that she was rotten and decayed and not properly loaded, resulting in her taking water and thereby shifting her cargo. Such theory is fallacious for the reason that it is opposed to the positive testimony of the claimant, and the petitioner has offered no evidence to the contrary.

The appellant urges that, since the tow was headed down-stream, if she struck the bank, it was of necessity with her bow, and, therefore, the injury to what they insist is the stern was not attributable to any such contact. Such contention is inconclusive, for again the appellant is attempting to oppose the positive facts with vague theory and surmisal.

It will be remembered that Percy Ames testified that, when he saw the scow against the bank, she was practically broadside to the river and that "he (the Captain) then got around and did not stop any more than to square himself with the river and go again." (Rec. p. 43.) Captain Jeffries testified that, when alongside of the scow, it was attempted to shove ahead, there is a tendency to shove sidewise and that the load on the tail end of the scow rubbed the trees that overhung the bank of the river (Rec. p. 89). Garner, the deckhand, testified to the same effect (Rec. p. 131). While both ends of the scow were identical in construction, if it be assumed that the rear end going downstream

is the stern, then it is conclusive that it was the rear end or stern that struck the bank. The physical facts support such contention and Captain Jeffries and Garner, in attempting to explain away the positive testimony of the disinterested witnesses as an optical illusion, state that it was the load on the stern that brushed the trees. It is apparent, therefore, that it was the stern that was nearest the bank and a physical necessity that it was that part of the scow that struck.

Appellant advances as an applicable proposition of law the rule that the burden to establish negligence is upon the claimant and that negligence is never presumed nor can the cause of an injury be left to speculation and conjecture. Such is the general rule. The exception is found in those cases in which the happening of an accident and the result is so unusual and extraordinary as to constitute evidence of negligence and shift the burden of proof.

In *The Steamer Webb*, 81 U. S. 406, 20 L. Ed. 774, cited by appellant, such principle is recognized in the following language:

> "The contract requires no more than he who undertakes a tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services. But there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it. Had the ship in this case been towed upon a shoal ten miles north or ten miles east of Handkerchief Shoal, after leaving that shoal for Cross Rip, it cannot be doubted that the

> fact of the stranding at such a place, would, in the absence of explanation, be almost conclusive evidence of unskillfulness or carelessness in the navigation of the tug. The place where the injury occurred would be considered in connection with the injury itself, and together, they would very satisfactorily show a breach of the contract, if no excuse were given. At least they would be sufficient to cast upon the claimants of the tug the burden of establishing some excuse for the deviation from the usual and proper course."
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> . . . . . .
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> "We do not say that in order to excuse, it must be shown that the accident was inevitable, but it ought to appear that so remarkable a deviation from her correct course, made so soon after leaving Handkerchief Light, was consistent with cautious and skillful management."

In the *Propeller Burlington*, 137 U. S. 383, 34 L. Ed. 731 (cited by appellant), it appeared that the Propeller took her tow along one route instead of the usual, safe and proper course at that season of the year, especially with the wind that was prevailing and, after having once gained shelter that offered a sufficient protection, left it and pulled the tow into the open lake where it was subject to the full force of the wind. The Court said:

> "These findings established that in what was done, there was an actual lack of the usual caution and skill, and that what was omitted to be done was within the power of the Propeller to do, and should have been done by any master of competent skill and experience; and that different conduct would, in all probability, have prevented the catastrophe. As we cannot

go behind the findings and they are sufficient to sustain the decree, further argument is not required. *The Maggie J. Smith*, 123 U. S. 349 (31:175); *The Gazelle*, 128 U. S. 474 (32: 496)."

The *J. P. Donaldson*, 167 U. S. 599, 42 L. Ed. 294, relied upon by appellant, was a case in which the law of general average was involved. The Court said:

> "The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services."

In the instant case, such skill was not employed. The Appellant offers no explanation, excuse or good reason why the scow was permitted to come in contact with the bank of the river where there was an abundance of room in which to navigate, and such fact is in itself negligence.

Other cases in which the law and facts are applicable to the instant case, are the following:

Burr vs. Knickerbocker Steam Towage Co., (C. C. A.), 132 Fed. 248, in which the Court said:

> "Under such circumstances, the fact that the schooner went aground casts upon the tug the burden of establishing some excuse for the deviation from the usual and proper course.

The Steamer Webb, 14 Wall. 406, 20 L. Ed. 774, is cited to the proposition that no presumption of negligence arises from the mere fact of damage to a tow. In that case, however, the Court said (page 414, 14 Wall. 20 L. Ed. 774):

'But there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it. Had the ship in this case been towed upon a shoal ten miles north or ten miles east of Handkerchief Shoal, after leaving that shoal for Cross Rip, it cannot be doubted that the fact of the stranding at such a place, would, in the absence of explanation, be almost conclusive evidence of unskillfulness or carelessness in the navigation of the tug. The place where the injury occurred would be considered in connection with the injury itself, and together, they would very satisfactorily show a breach of the contract, if no excuse were given. At least they would be sufficient to cast upon the claimants of the tug the burden of establishing some excuse for the deviation from the usual and proper course.'

In *Inland & Seaboard Coasting Co. vs. Tolson*, 139 U. S. 551, 554, 555, 11 Sup. Ct. 653, 35 L. Ed. 270, it was said:

'The whole effect of the instruction in question, as applied to the case before the jury, was that if the steamboat, on a calm day, and in smooth water, was thrown with such force against a wharf properly built as to tear up some of the planks of the flooring, this would be prima facie evidence of negligence on the part of the defendant's agents in making the landing; unless upon the whole evidence in the case this prima facie evidence was rebutted. As such damage to a wharf is not ordinarily done by a steamboat under the control of her officers and carefully managed by them, evidence that such damage was done in this case was prima facie,

and, if unexplained, sufficient evidence of negligence on their part, and the jury might properly be so instructed. *Stokes vs. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115; *Transportation Co. vs. Downer*, 11 Wall. 129, 134, 20 L. Ed. 160; *Railroad Co. vs. Pollard*, 22 Wall. 341, 22 L. Ed. 877; *Le Barron vs. East Boston Ferry*, 11 Allen 312, 317, 87 Am. Dec. 717; *Feital vs. Middlesex Railroad*, 109 Mass. 398, 12 Am. Rep. 720; *Rose vs. Stephens & Condit Co.* (C. C.), 11 Fed. 438.'

In order to prove negligence it is not invariably necessary that the libelant shall show the specific details of negligence, or account for the exact manner in which the injury is inflicted. When the libelant proved that the moving of the vessel was in sole charge of the tug, that the schooner's wheel was hard aport, and that on a summer afternoon, with a light breeze and moderate tide, and with nothing to prevent the tug from having such full control of the schooner as would keep her in deep water, she was so towed that she came up on the westerly shore, or upon a well-known rock, before she had gone more than three or four lengths, a prima facie case of negligence was established.

The learned District Judge, though finding that the accident was not properly accounted for, declined to hold the tug responsible in damages. We are of the opinion that this was error, and that, under the rule of the cases cited, the burden of explanation was cast upon the tug to account for this apparently unnecessary grounding. The tug proved no fault in the management of the schooner and gave no reasonable explanation why she did not keep the schooner under control. On this showing alone, the libelant was entitled to a decree for damages."

In the *W. G. Mason* (C. C. A.), 142 Fed. 913, the steamer was stranded while being towed by two tugs. The Court said:

> "It suffices that the misfortune occurred without any fault on the part of the tow, or on the part of the Babcock, and under a state of circumstances in which, *if proper care is exercised in performing a similar service, such misfortune does not ordinarily occur.* This was enough to impose upon the tugs the burden of proof to show that they did exercise due care. *Rose vs. Stephens & Condit Co.*, 20 Blatchf. 411, 11 Fed. 438; *Inland & Seaboard Coasting Co. vs. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270. This Court has had frequent occasion to apply this doctrine in similar cases; the latest being the case of *The Genessee* (C. C. A.), 138 Fed. 549.
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> The proof offered by the tugs did not afford any explanation of the causes of the disaster aside from the alleged disregard of orders by the tow. No unforeseen difficulties were encountered and no obstacle which the tugs were not bound to anticipate. The case is one where the stranding of the steamer created a presumption of negligence. *The Webb*, 14 Wall. 406, 20 L. Ed. 774; *The Kalikaska*, 107 Fed. 959, 47 C. C. A. 100."

The District Court, passing on the last mentioned case, 131 Fed. 636, wrote:

> "Under the facts of the case, the burden is upon the libelees to satisfactorily excuse their wrongful omission to exercise the degree of care demanded by the situation. *A specific act of negligence need not be shown by libelant.* The rule which requires affirmative proof of negligence against a tug by her tow is conspicuously distinct from the rule which is applied to a common carrier, who, when proceeded

against on contract, is presumptively in fault. Not so, however, *where the result indicates* negligence on the part of the tug having charge and control of her tow. It is perfectly true that the adjudications uniformly hold that an engagement to tow imposes neither the obligation to insure nor the liability of a common carrier, and accordingly negligence must be proven by the libelant. *The Margaret*, 94 U. S. 494, 24 L. Ed. 146; *The Lady Wimett* (D. C.), 92 Fed. 400; *The A. R. Robinson* (D. C.), 57 Fed. 667; *In re Thomas Wilson* (D. C.), 124 Fed. 653; *The J. P. Donaldson*, 167 U. S. 603, 17 Sup. Co. 951, 42 L. Ed. 292. The burden is always upon him who alleges the breach of the towing contract to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness, to his injury, in the performance. But the above cases do not strictly apply here. There are exceptions to this rule.

In the *Steamer Webb*, 14 Wall. 406, 20 L. Ed. 774, the exception is stated in the following language, quoted from the opinion:

> 'Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been at fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services. But there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it.'

In the *Allen McGovern* (D. C.), 27 Fed. 868, the rule is succinctly stated in the headnote in these words:

> 'Where one of a large number of boats in a tow is injured by striking some obstruction on a trip over a common and safe route, the burden is upon the tug to give some rational explanation of the injury, or a consistent account of the trip, that may satisfy the Court that there was no lack of due care in navigation.' "

In *The Genessee* (C. C. A.), 138 Fed. 549, the Court said, at page 550:

> "The case is a proper one for the application of the rule that presumption of negligence arises against a bailee for hire when it appears that the subject of the bailment has been injured or destroyed while within his custody by an accident such as in the ordinary course of things does not happen when a bailee uses due care."

In *The Seven Sons* (D. C.), 29 Fed. 543, the Court said (p. 554):

> "The owners of a tow boat, it is true, are not common carriers, and they are responsible only for ordinary care, skill, and diligence. But a bailee subject to that degree of responsibility only is yet bound to show how the goods intrusted to him were lost or damaged, before he can throw upon the bailor the burden of proof of negligence. *Clark vs. Spence*, 10 Watts, 335; *Beckman vs. Shouse*, 5 Rawle, 179; *Logan vs. Mathews*, 6 Pa. St. 417. Now, here, the owners of the tow-boat were bailees for hire of the flatboat. Again, it has been held that, under a bill of lading excepting 'the dangers of the river,' it is not enough for the carrier to show that his steamboat ran upon a stone and knocked a hole in her bottom, but he must also prove that due diligence and proper skill were used to avoid the disaster, and

that it was unavoidable; and this, because the facts are peculiarly within the knowledge of himself and his agents. *Whiteside vs. Russell*, 8 Watts & S. 44. In the absence, then, of all testimony as to the manner in which the libelant's flatboat was injured, or acquitting the towboat of blame, negligence is justly to be presumed. *Humphreys vs. Reed*, 6 Whart. 444."

In the *Florence* (D. C.), 88 Fed. 302, it was said (pp. 303-304):

"The evidence is overwhelming that the Whitney was in a seaworthy condition at the time she was taken in tow by the Florence. The respondents offered some evidence of admissions by the Whitney's master that, on her journey from Buffalo, she struck upon sharp rocks at a point where blasting was going on and received injuries which caused her to leak. This is denied by the master and every member of the crew testified that nothing of the kind occurred. Admissions are most unsatisfactory proof of facts and should not be accepted against positive proof to the contrary. Assuming, then, that when taken in tow the Whitney was in ordinary condition of canal boats of her class, the inference is plain that something must have occurred on the way down the river to cause the sudden and dangerous leaking. She was then wholly in charge of the tug."

The Allen McGovern (D. C.), 27 Fed. 868;
The Ashbourne (D. C.), 206 Fed. 861;
The C. W. Mills (D .C.), 241 Fed. 241;
Great Lakes Towing Co. vs. Shenango S. S. & T. Co. (C. C. A.), 238 Fed. 480;
The Delaware (C. C. A.), 20 Fed. 797;
The Neponset (D. C.), 251 Fed. 752.

III. AND IV.

Was the Loss Due to the Turbulent Condition of the Waters of the Sound and Was the Tug Negligent in the Performance of the Towage Service?

(Fourth and Fifth Assignments of Error.)

If the Appellant's contention on these issues is correct, how can the mishap that befell the scow be accounted for, since it was in a seaworthy condition at the time, unless the contact with the bank cracked its end and opened its seam? The more stronger its contention on these issues, the more conclusive evidence of its negligence on the preceding issues.

From a reading of Captain Jeffries' testimony it is apparent that, if he examined the scow at all, it was merely perfunctory. He simply walked around her and did not make any examination of her interior. Captain Hancher testified: "Well, anybody that tows a scow and wants to use any precaution at all, ought to examine the scow if she has got a load; take up a hatch and go down inside and see if there is any water in her, so you would know that your scow was in proper condition to go out and make a trip." (Rec. p. 61). Notwithstanding Captain Jeffries' denial, he must have known that the scow was against the bank of the river. This was sufficient to require cautious inquiry and survey to determine if damage had resulted to the scow. He arrived at Priest Point at 1 p. m. and laid to until 11 p. m. on account of the

turbulent condition of the water (Rec. p. 88). It is, therefore apparent that he had misgivings up to that time at least as to the safety of the scow in the sea that prevailed, and we submit that the ordinary, careful and prudent master, under the attendant circumstances, would have made the examination that Captain Hancher said the custom was. It is conclusive in our mind that the contact with the bank so raised the header and so opened the seams as to make the scow easy prey to the sea that prevailed on that evening.

The Sound was not as mild as Appellant contends. Captain Hancher testified, if he had been in charge of the Tug Defender, he would have hunted shelter; that he would not have attempted to tow under the existing conditions, but would have tied up at Muckilteo. That, in his opinion, it was not safe to tow that night with a loaded scow (Rec. pp. 72-74), and it will be remembered that he was in the same waters that evening.

We, therefore, submit that it was not merely an error of judgment on Captain Jeffries' part, but a flagrant example of lack of skill and discretion. He did not exercise the judgment that the ordinary prudent and careful Master would under similar circumstances, and that is the test and measure of the law.

Not only was the Captain negligent in the particular of venturing forth, but it appears that he had proceeded eighteen miles before he noticed that

she had dumped her load, and had swamped,—his attention being attracted to the fact that the tow had lost its lights. The evidence was that lumber was scattered all over the Sound and discloses that a great portion of the load had been dumped prior to the time her light went out. He did not watch or pay any attention whatsoever to his tow from the time he ventured forth in the turbulent waters. It is reasonable to suppose from the evidence that she had been shipping water for some time prior to his observation that she was in trouble. The testimony is, and it is a matter of common knowledge, that, as soon as a scow commences to take water, she will list. Garner, the deckhand, testified, that the Captain could have seen the scow if he stood in the doorway and looked back (Rec. p. 133). It is, therefore, self-evident that, if Captain Jeffries had exercised but the slightest care and paid but casual attention to the scow, he would have observed her condition prior to the loss of her load, or at least the greater portion thereof; and, under the law, it was his duty to observe and watch his tow.

The Alleghany, (C. C. A.), 252 Fed. 6;
Gilchrist Transportation Co. vs. Great Lakes Towing Co. (D. C.), 237 Fed. 432;
Mylroi vs. British Mills Co., (C. C. A.), 268 Fed. 449.

V.

Seaworthiness of the Scow

(First Assignment of Error.)

We have heretofore discussed this issue and

him to contend, if petitioner's statement is true that there were 866 sticks impounded, that but eight or nine would be damaged.

The value of the timber at the time was $27 or $28 per thousand, or more than twice the appraised value of the tug, and, as the Lower Court found, the cost of the remanufacture of the lumber and to place it at the point of destination would be at least the amount of the appraised value of the Tug.

We respectfully submit that the Decree of the Lower Court is supported by both the law and the facts and should be affirmed.

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